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**Pro-Human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective**

by

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**Abstract:**

*Judicial activism is a contested phenomenon, with the liberals and even the conservatives championing it while denouncing its particular manifestations. In this article, I examine the recent judicial practice of one of the most activist judiciaries in the world, from India, where progressive politics is often, and sometimes always, associated with an activist and benign court. Indeed, the Indian Supreme Court has a global reputation as a torch bearer on human rights. In this article, I adopt a social movement perspective to understand the actual impact of the court on the struggles of the poor for livelihood, resources, values and identity, enacted through struggles for the recognition and realization of economic, social and cultural rights. After an analysis of the record of the Supreme Court of India, I conclude that the Court has increasingly shown a bias against the poor in its activist rulings, and made judicial activism a more problematic device for social movements in India to rely upon. To explain why this is happening, the article introduces two ideas; first, the emergence of the judiciary as an organ of governance and its attendant problems; and second, the internally biased nature of the rights discourse which tends to reproduce binary arguments for either increasing State capacity or for increasing choice of goods in the market place. The article concludes by exploring lessons from the jurisprudence of other countries and international law, and urges the Indian Supreme Court to reinvent a jurisprudence informed more by the social movements of the poor.*

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Social movements<sup>1</sup> in India have depended heavily upon the Indian Supreme Court since it began its activist phase in the late 1970s. Human rights groups and concerned citizens have approached the Court for remedy and the Court has responded impressively. It has sneaked in ‘due process’ into Indian jurisprudence to curb detention without trial<sup>2</sup>, expanded the meaning of right to life under Article 21 to include livelihood<sup>3</sup> and environment<sup>4</sup>, defended the freedom of the media<sup>5</sup>, guarded the rights of employees<sup>6</sup>, read some Directive Principles in Part IV such as basic education into fundamental rights<sup>7</sup>, taken measures to advance gender justice<sup>8</sup> including through a progressive incorporation of international law into domestic law and innovated procedural measures such as an expansive concept of standing, continuing mandamus and court-appointed commissions of enquiry.<sup>9</sup> Indeed, it will not be an exaggeration to say that most social

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<sup>1</sup> I do not use the term social movements here with a single, precise definition, but as a way to talk about collective struggles over resources, values and identity. The definitions are much contested in the very rich literature on social movements. For an overview, see e.g. *The Blackwell Companion to Social Movements* (David A. Snow, Sarah A. Soule & Hanspeter Kreisi, eds., 2004), chapter 1. I have extensively discussed and reviewed this literature earlier especially as it relates to international law. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003); *International law and Social Movements: Challenges of Theorizing Resistance*, 41 *Columbia J. Transnat'l L.* 397 (2003); *From Resistance to Renewal: The Third World, Social Movements and The Expansion Of International Institutions*, 41(2) *Harv.Int'l L.J.* 529 (Spring 2000).

<sup>2</sup> *Manekha Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>3</sup> *Olga Tellis and others v. Bombay Municipal corporation*, AIR 1986 SC 180.

<sup>4</sup> *Center for Environmental Law WWF-I v. Union of India*, (1999) 1 SCC 263

<sup>5</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

<sup>6</sup> *Bangalore Water Supply & Sewerage Board v. R. Rajappa*, (1978) 3 SCR 207.

<sup>7</sup> *J.P. Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645.

<sup>8</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 247.

<sup>9</sup> For a discussion, see Upendra Baxi, “Taking Human Suffering Seriously: Social Action Litigation Before the Supreme Court of India”, in Neelan Tiruchelvan & Radhika Coomaraswamy eds., *The Role of the Judiciary in Plural Societies* (St.Martin’s Press, 1987); Ashok H. Desai, and S.Muralidhar, “Public Interest Litigation: Potential and

movements in India since 1970s have actively used the courts – especially the Supreme Court – as part of their struggles, whether it be the women’s movement, the labor movement, the human rights movement or the environmental movement. Despite this activism, it is now increasingly recognized that the impact of the Court on ground reality has not been consistent. In the area of human rights for instance, studies show that the Court’s seminal rulings are often not translated into reality for a range of reasons.<sup>10</sup> In addition, the Court’s activism, especially under the umbrella of social action litigation (SAL), has itself come under criticism for its undemocratic nature, lack of effectiveness and judicial grandstanding as well as its alleged violation of separation of powers. As one distinguished observer of judicial activism puts it, “judicial activism is at once a peril and a promise, an assurance of solidarity for the depressed classes of Indian society as well as a site of betrayal”.<sup>11</sup>

In this essay, I join this critique and call attention to the limitations of judicial activism, as it has been practiced more recently, for a progressive social movement politics.<sup>12</sup> Rather than criticizing judicial activism for its counter-majoritarian character

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Problems” in B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan and Raju Ramchandran eds, *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000); S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002).

<sup>10</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998), chapters 5 and 6.

<sup>11</sup> Upendra Baxi, “The Avatars of Indian Judicial Activism: Explorations in the Geographies of (In)Justice” in S.K.Verma and Kusum (eds.) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, Delhi, 2000) at 161.

<sup>12</sup> This essay is not intended, by any means, to be a critique of judicial activism per se. Rather, its goal is to explore the limits and possibilities of deploying judicial power as part of larger social movement struggles, an area in which the Indian Supreme Court has been a world leader for a long time. This essay is part of an on-going larger project of

or its lack of effectiveness on the ground, I focus attention on the ideological character of the Court's particular approach to human rights. In particular, I suggest that the Court's activism increasingly manifests several biases - in favor of the state and development, in favor of the rich and against workers, in favor of the urban middle class and against rural farmers, and in favor of a globalitarian class and against the distributive ethos of the Indian Constitution – that, when taken together, result in an ideological interpretation of human rights.<sup>13</sup> This ideological interpretation is the result, I suggest, of at least two dynamics: the first one internal to the Court itself that grows out of the particular history of the evolution of the Court since 1970s, as an organ of state governance thereby leading to the emergence of what I call 'judicial governance'; and second, a dynamic that is external to the Court and the result of the human rights discourse itself, especially as it has been constructed at the international level and reproduced at the domestic level. The first dynamic neutralizes the transformative potential of the Court, while the second dynamic shows the inherently elitist and anti-poor nature of international human rights. These dynamics produce a constrained court-centered approach to human rights, despite

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mine that seeks to compare the place of judicial activism in social movement struggles in Southern democracies.

<sup>13</sup> By saying that the Court's interpretation of human rights is 'ideological', I do not mean the more common understanding that it is either dogma, or simply not neutral. Interpretations of human rights can hardly be neutral. Nor do I use the word 'ideology' in a Marxist sense to mean false consciousness. Rather, what I mean by an ideological interpretation of human rights is that the meaning of human rights that emerges from the Court's jurisprudence is systematically sustaining and reproducing forms of domination in Indian society. For my understanding of the role of ideology and domination through judicial practice, I rely on Duncan Kennedy, *A Critique of Adjudication* (1998), especially 290-294. I also rely on John Thompson's definition of ideology, lucidly explained in Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford, Oxford University Press, 2000) at pp.8-15. In this sense, an ideological interpretation of human rights means simply an interpretation that defends and favors the status quo and the relations of domination that constitute the status quo.

the occasionally inspiring judgments that emanate from the Court. I argue that this constrained approach by the Court to human rights is primarily due to its concern that its decisions are compatible with an overall ‘logic of the state’ in which the higher judiciary plays its appointed role as an instrument of governance much more often than its traditional role as an institution of justice. This notion of ‘judicial governance’ imposes inherent limitations on the extent to which the Court can be expected to be an active part of social movement struggles for realization of human rights, particularly those rights that are sought to be exercised in conflict with statist and developmentalist ideologies.

Part I provides a brief overview of the Indian Supreme Court’s mixed record in protecting human rights including through the incorporation of international legal norms. In Part II, I explain that this mixed record in protecting human rights is the complex product of several factors including the evolution of the Indian Supreme Court as an organ of governance, its historical tensions with the legislature, its expansion of the human rights agenda due to its prominence as a site of movement politics and the political and class alignment of individual judges. Part III discusses the ideological biases that are inherent in the discourse of human rights itself, including the biases against economic, social and cultural rights, which operate to render the Court as marginal to social movement struggles even when it tries to incorporate international norms into domestic law. In particular, I focus on the way the realization of economic and social rights under international law is seen to be dependent upon either state capacity or greater free market-led consumption and argue that this conceptualization is part of the reason why the Court has been biased. In Part IV, I discuss some recent dissident strands of comparative and international jurisprudence on human rights, which

have had a much more active relationship with social movement politics, and ask whether the Indian Supreme Court can learn any lessons from this experience. In Part V, I conclude by arguing that the Court must abandon its ideological approach to human rights and refashion its jurisprudence in ways that strengthen social movement struggles of the poor.

### I. The Supreme Court and human rights: A mixed record<sup>14</sup>

The human rights record of the Indian Supreme Court is, by and large, product of the post-Emergency period in Indian politics. Partly due to its desire to atone for its mistake in deciding the infamous *Habeas Corpus Case*<sup>15</sup>, and to thereby recover the moral ground that it had lost among the public, the Supreme Court began an activist phase, liberally interpreting constitutional rights to expand the domain of freedom. Its focus on human rights was also politically acceptable given that the Janata government in power between 1977 and 1979 could only favorably look upon a Court which was trying to address some of the worst legacies of the Emergency such as the abuses in prisons. Thus, in a series of

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<sup>14</sup> This section is not by any means, intended to be a comprehensive historical survey of the Supreme Court's vast jurisprudence over more than half a century. Far more qualified jurists and practitioners have already done a superb job of surveying and assessing the Court's record. See e.g., S.P.Sathe, *supra* n.8. Nor is it a verdict on the Court's undoubted value as a resource for realizing rights, like some other recent studies. See Epp, *supra* n.9. Rather, the purpose of this section is only to outline the broad directions that the Court has taken recently given its historical evolution, and to assess evidence of judicial bias. The goal of this exercise is the expectation that the Court's activism can be nudged towards a more subaltern direction.

<sup>15</sup> *A.D.M. Jabalpur v. S.S. Shukla*, (1976) 2 SCC 521.

cases the Court expanded the legal rights of detainees and under-trials<sup>16</sup>, addressed custodial deaths<sup>17</sup> and extra-judicial killings, awarded compensation for violation of fundamental rights<sup>18</sup> and expanded the substantive meaning of equality through affirmative action<sup>19</sup>. The Court has also expanded the rights of women including rape victims<sup>20</sup>, as well as the rights of children<sup>21</sup>. Its commitment to human rights continues to inspire public admiration as the public reaction to the recent Best Bakery Case<sup>22</sup> shows. In many of these cases, the Court has liberally interpreted the constitutional provisions, reading international law into domestic law.<sup>23</sup> Many of these human rights rulings were made possible through a procedural revolution that is a unique Indian contribution to the world, through the democratization of standing to sue and through such innovative devices as a continued mandamus, and judicial commissions of enquiry. The Court has converted an ordinary list of fundamental rights into a veritable weapon of the weak through creative judicial interpretation. In this, the Court was doubtlessly riding a human rights wave, driven by a range of social movements that were sprouting all over India in the aftermath of the Emergency, which were seeking refuge in the Court after finding that

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<sup>16</sup> *Hussainara Khatoon v. State of Bihar* (I to VI), (1980) 1 SCC 81; *Sunil Batra v. Delhi Administration* (1980) 3 SCC 488; *Citizens for Democracy v. State of Assam* (1995) 3 SCC 743.

<sup>17</sup> *D.K. Basu v. State of West Bengal*, 1997 1 SCC 416

<sup>18</sup> *Id.* at 439.

<sup>19</sup> *State of Kerala v. N.M. Thomas*, (1976) 1 SCR 906.

<sup>20</sup> *Delhi Domestic Working Women's Forum v. Union of India*, 1994 (4) SCALE 608; *Vishaka*, supra n.7; *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465.

<sup>21</sup> *Supra* n.6.

<sup>22</sup> *Teesta Setalvad & Others v. State of Gujarat & Others*, 2004 SCCL.COM 404 (decided on April 12, 2004); *Zaheera H. Sheikh & Others v. State of Gujarat & Others*, 2004 SCCL.COM 507 (decided on April 12, 2004).

<sup>23</sup> *Supra* n.7.

bureaucratic and traditional political avenues of action were proving to be more intractable.

Despite this laudable activism in human rights, the Court's record is characterized by a serious measure of substantive adhocism. In particular, the Court's record on economic, social and cultural rights remains deeply unsatisfactory. With some notable exception such as a recent judgment dealing with the right to education<sup>24</sup>, the record of the Indian Supreme Court in enforcing internationally recognized economic, social and cultural rights is patchy and is getting worse especially when compared to the heyday of its activism when Justices such as Krishna Iyer and Chinnappa Reddy were on the bench. In the area of labor rights, despite the impression that the Indian Courts remain sympathetic to labor due to India's pro-labor laws, the record of the Court shows an inconsistent approach without affording protection to crucial rights such as the right to strike though it has passed several important judgments relating to the abolition of forced, bonded and child labor.<sup>25</sup> Though many of these latter judgments remain current law, they were all issued in early 1980s and not after the economic liberalization began in earnest in 1991. Indeed, a judgment that reflects current judicial trend is the Court's decision in the *T.K.Rangarajan* case, declaring that the Tamil Nadu Government Employees had no legal, moral or equitable right to strike.<sup>26</sup> While individual judges in the past have shown a great deal of sympathy to labor, including Justices Desai and Krishna Iyer, the more recent crop of judges appear to display less sympathy. This

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<sup>24</sup> Supra n.6.

<sup>25</sup> *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473; *Sanjit Roy v. State of Rajasthan*, AIR 1983 SC 328; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

<sup>26</sup> *T.K.Rangarajan v. Government of Tamil Nadu and Others*, 2003 SOL Case No.429.

change in the attitude of the judges towards labor rights cannot be divorced from the broader socio-economic context of liberalization, privatization and World Bank and IMF demands for reform of labor laws since 1991.

Even in the case of land rights as a distinct category of human rights, the Court's record is far from satisfactory.<sup>27</sup> The record of the Court during the first two decades of its existence could only be described as a grudging and resigned support as it struggled to contain the political branches from carrying out the agrarian/land reform that was seen to be necessary to realize the vision of the Constitution. Thus the Court frequently held that such land reforms violated aspects of the constitutional right to property, especially the requirement to pay compensation, even as it upheld the protection of land reform laws from judicial scrutiny.<sup>28</sup> The attitude of the Court began to change in the early 1970s as more pro-poor judges such Krishna Iyer and Bhagwati joined and the Court began to uphold agrarian reform especially under the new Constitutional amendments that had been adopted to shield land reform laws from judicial scrutiny. As Justice Krishna Iyer said in *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*<sup>29</sup> while upholding the constitutional validity of a land reform law from Kerala, "the concept of agrarian reform

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<sup>27</sup> It must be noted that land rights are not protected as a special sub species under the Constitution. Rather, it must be read as a structural feature of the Constitution resulting from the commitment to agrarian reform in general under the Article 31 (4) and (6) as enacted in 1950. Further, the status of land rights as a species of human rights under international law is also far from clear and must also be read to be implied from the 'vision' of the post-colonial, Third-World and Soviet influenced international law, that began to take shape from the late 1960s.

<sup>28</sup> For example, compare *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 (upholding the validity of the first amendment to the Constitution that shielded land acquisition laws from legal challenge under Part III) with *State of West Bengal v. Bela Banerjee*, AIR 1954 SC 170 (ruling that the meaning of 'compensation' in Article 31(2) meant just equivalent for the property acquired).

<sup>29</sup> (1973) 2 SCC 713, at page 731 (Krishna Iyer J., concurring).

is a complex and dynamic one promoting wider interests than conventional reorganisation of the land system or distribution of land. It is intended to realise the social function of the land and includes — we are merely giving, by way of illustration, a few familiar proposals of agrarian reform — creation of economic units of rural production, establishment of adequate credit system, implementation of modern production techniques, construction of irrigation systems and adequate drainage, making available fertilizers, fungicides, herbicides and other methods of intensifying and increasing agricultural production, providing readily available means of communication and transportation, to facilitate proper marketing of the village produce, putting up of silos, warehouses, etc., to the extent necessary for preserving produce and handling it so as to bring it conveniently within the reach of the consumers when they need it, training of village youth in modern agricultural practices with a view to maximising production and help solve social problems that are found in relation to the life of the agricultural community. The village man, his welfare, is the target.” This nuanced understanding of the importance of agrarian reform and land rights was, however, limited to some justices and temporally limited between the early 1970s to the early 1980s. On the whole, the record of the Court has been more in favor of property rights, narrowly construed, and not land rights. The agonized and complex balance that the Court struck in *Kesavananda Bharati*<sup>30</sup> between the amendment power and the structural integrity of the Constitution could also be seen, from one angle, as a balance between property rights and human rights. Indeed, with the repeal of the property rights clause in the Constitution through the 44<sup>th</sup> amendment in 1978, it could be said that the role of the Court in securing land

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<sup>30</sup> See infra n.46.

rights (as opposed to property rights) has been almost negligible. This was so even during the 1970s when political focus was on the issue of land, when compared to the more activist role of the political branches at the federal and state levels. Since the mid-1980s, and especially since economic liberalization began in 1991, land issues have not been at the top of the political or judicial agenda.

In cases relating to housing rights or right to health, the Court has rarely shown the kind of aggressive public policy interventionism that it exhibits in other areas such as environment. Even in landmark rulings such as *Olga Tellis*, the Court has never ruled that the slum dwellers actually had a right to housing but only that an eviction without a notice and a hearing would amount to an arbitrary violation of their right to livelihood which is part of right to life under Article 21.<sup>31</sup> What is affirmed is thus a right to a process and not a remedy for the structural violation itself. The removal of the right to property as a fundamental right by the 44<sup>th</sup> amendment to the Constitution in 1978 has also made it more difficult to advance a claim of right to housing understood substantively as a spatial assertion by any individual, despite the presence of Articles 31A and 300A. Though the Court has not hesitated from using even soft law sources such as resolutions of the UN or even the International Law Commission to reinterpret Indian constitutional provisions relating to environment, sustainable development or workplace gender discrimination, it does not show the same kind of adventurism while dealing with socio-economic rights such as housing. This is surely not because of lack of legal sources. For example, in the infamous case of *Narmada Bachao Andolan* in 2000<sup>32</sup>, the Court put its seal of approval on the largest Court-sanctioned forced eviction in the world

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<sup>31</sup> *Supra* n.2 at 194.

<sup>32</sup> *Narmada Bachao Andolan vs. Union of India & Others*, 10 SCC 664.

though abundant international legal materials existed to show that the raising of the height of the Sardar Sarover dam was contrary to current legal standards.<sup>33</sup> Though the counsel in that case argued that the forced eviction of tribal people was a violation of Article 21 read with ILO Convention 108 to which India is a party, the Court rejected the argument.<sup>34</sup> But it is remarkable that the counsel did not argue that several economic, social and cultural rights of the tribal people were violated under the International Covenant on Economic, Social and Cultural Rights<sup>35</sup> (hereinafter ICESCR) to which India is a party, showing perhaps how much salience the language of socio-economic rights has before the Court. Nor did the counsel argue that the Narmada tribals had a constitutional right to carry on a trade or business according to Article 19(1)(g) of the Constitution or that the tribals had a property right under Articles 300A and 31A. In effect, this has meant that constitutional rights – to trade, do business or to property – are recognized by the Court only for the rich and not for the poor who are often outside the formal legal system and therefore lack any formal entitlements under state law.

Subsequent case law on the Narmada dispute only reconfirms the inability or unwillingness of the Supreme Court to ensure even a minimal adherence to the rule of law and due process in the construction of India's largest dam project, and indeed makes the 2000 judgment appear benign by comparison. After dragging the case through the Court for another five years, followed by an apparently favorable ruling in 2005 for the

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<sup>33</sup> For a critique of the judgment, see Balakrishnan Rajagopal, "Limits of Law in Counter-hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle" in Boaventura de Souza Santos and César A. Rodríguez-Garavito, editors, *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge: Cambridge University Press (forthcoming, 2004).

<sup>34</sup> See *id.*

<sup>35</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 11(2), 993 UNTS 3.

displaced people on procedural grounds<sup>36</sup>, the Court has once again struck a grievous blow for the rights of the displaced people in the Narmada valley, by allowing the further raising of the height of the main dam in the project even though most of the displaced people have not been resettled according to the Court's own previous orders.<sup>37</sup> This troubling failure of justice has occurred despite a finding of utter failure by the authorities to fulfill the terms of resettlement, according to a confidential report prepared by a Group of Ministers appointed by the Prime Minister,<sup>38</sup> as well as an unprecedented 20-day fast by the leaders of the affected community in New Delhi.<sup>39</sup>

This could be contrasted to other recent cases wherein the Court has recently displayed remarkable activism in upholding the rights of urban landlords under Article 19(1)(g) and struck down the Bombay Rent Control Act.<sup>40</sup> Only a fierce agitation by the tenants in the aftermath of the judgment prevented the government from revising the rents upwards. On top of this, the Court ordered the government of Maharashtra to change the law forthwith, intruding into the legislative domain through activism that learned observers see as a violation of separation of powers.<sup>41</sup>

In addition, the Court's decisions are increasingly characterized by an urban and elitist bias against the poor and the countryside. In a range of cases involving conflicts

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<sup>36</sup> Narmada Bachao Andolan v. Union of India and Others, March 15, 2005, available at <http://narmada.aidindia.org/docs/narmadaverdict.pdf>

<sup>37</sup> Narmada Bachao Andolan v. Union of India and Others, May 8, 2006, available at <http://narmada.aidindia.org/content/view/49/26/>. For a critical commentary on the Court's judgment, see Ramaswamy Iyer, 'Abandoning the displaced', *The Hindu*, May 10, 2006.

<sup>38</sup> See the text of the report in the Hindu, April 17, 2006, available at <http://www.hindu.com/2006/04/17/stories/2006041705231100.htm>

<sup>39</sup> For coverage, see <http://www.narmada.org/index.html>

<sup>40</sup> *Malpe Vishwanath Acharya v. Maharashtra*, (1998) 2 SCC 1. See also *Joginder Pal v. Naval Kishore Behal*, (2002) 5 SCC 397.

<sup>41</sup> See Sathe, *supra* n.8 at 282-283.

between protection of the environment and workers' rights/tribal rights/housing rights, the Court has chosen the former, without bothering much to balance the two objectives.<sup>42</sup> When polluting industries are ordered to be closed by the Court, the workers and their families who are directly affected, are rarely heard before orders are issued. The Court's remarks often display much attention to the environmental issues that are of importance to urban dwellers such as pollution, while showing relatively less attention to rural livelihoods, which are often intricately tied to the land and forests. In the Narmada case, for instance, the Court showed complete callousness to the plight of the rural and tribal people targeted for displacement and declared that "the displacement of the tribals and other persons would not per se result in the violations of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress".<sup>43</sup> Implicit in this is the notion that rural and tribal livelihoods are inferior and bound to be displaced through urbanization and modernization. Likewise, the Court's activism in the area of environment is also characterized by a readiness to protect the environment and health of the rich while ignoring the structural poverty and governmental failure that causes these health problems in the first place. For instance, in *Ratlam Municipal Council* case<sup>44</sup>, the Court was ready to rely on section 133 of the Criminal Procedure Code to order a municipality

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<sup>42</sup> See e.g., *M.C.Mehta v. Union of India*, (1997) 11 SCC 227; *F.B. Taraporawala v. Bayer India Ltd.* (1996) 6 SCC 58; *M.C.Mehta v. Union of India* 1996 (1) SCALE SP-22; *Pradeep Krishen v. Union of India* (1996) 8 SCC 599; *Animal & Environmental Legal Defence Fund v. Union of India* (1997) 3 SCC 549.

<sup>43</sup> *Supra* n.24 at 702-3.

<sup>44</sup> *Infra* n.34.

to abate public nuisance caused by open drains and public excretion by slum-dwellers, reading environmental protection broadly to include health and injecting that reading into Part III. But the Court's order did not concern the rights of the slum dwellers themselves whose recourse to public excretion was the result of lack of infrastructure which is the responsibility of the municipality though Justice Krishna Iyer pointed out that "decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies".<sup>45</sup> Nor did it concern the rights of those *dalits* who are socially condemned to perform the odious practice of manual cleaning of public toilets, despite the fact that it has been outlawed.<sup>46</sup> Indeed, in several cases, the state courts have also ordered specific measures such as construction of extra public latrines for protecting human health and sanitation under Article 21, while ignoring the rights of the dalits who are employed to clean them manually.<sup>47</sup> To point out these facts is not to belittle the valiant record of the Court in protecting the environment or in attempting to shore up processes of governance, but it must be recognized that the Court's record has much room for improvement.

To sum up, the Court's approach to human rights enforcement could be said to overemphasize civil and political rights at the cost of economic, social and cultural rights.<sup>48</sup> The result of this overemphasis is that the Court has tended to relatively neglect those rights that are of most importance to the vulnerable segments of India society, often

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<sup>45</sup> Id. at 1629.

<sup>46</sup> Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

<sup>47</sup> See e.g., *Dr. K.C.Malhotra v. State of M.P.*, AIR 1994 MP 43; *L.K.Koolwal v. State of Rajasthan*, AIR 1983 Raj.2; *Kinkri Devi v. State*, AIR 1988 HP 4.

<sup>48</sup> For an earlier statement, see Balakrishnan Rajagopal, 'The Supreme Court and Human Rights', *The Hindu* (December 6, 2000).

organized in the form of a multitude of social movements. To put it this way may be seen as somewhat unfair to the Court and some objections could be raised. First, it could be contended that the Court is constrained by the language of the Indian Constitution, which makes fundamental rights in Part III judicially enforceable and leaves the Directive Principles of State Policy in Part IV as policy aspirations. Given that many socio-economic rights are contained in Part IV, it could be argued that the Court could not enforce them as robustly as it does the rights contained in Part III. That claim is not well-founded because the Court has not hesitated from reading several other Directive Principles into fundamental rights, such as the policy of environmental protection in Article 48A into Article 21. The Court could, if it wishes, do the same with regard to housing, redistribution of wealth and health. Second, it could be argued that the Court may have been constrained by a need to respect the boundary between law and policy, or that it could have been concerned about its own function and role vis-à-vis other branches of government or that it wanted to ensure that its orders had a reasonable prospect of being implemented. None of these arguments hold any water since the Court has rarely paid much attention to these issues in its impressive career of judicial activism.<sup>49</sup> For example, in the area of environment, the Court has issued orders for closing tanneries, shut down polluting industries and closely supervised enforcement of statutes, rarely constrained by a concern to respect the boundary between law and policy.<sup>50</sup> Even when it was clear that the enforcement of these judicial orders had financial implications that only the government and the legislature had the power to

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<sup>49</sup> For a discussion of these possible limits to judicial activism, see Desai and Muralidhar, *supra* n.8 at 176-183.

<sup>50</sup> For a discussion, see Harish Salve, “Justice between generations: Environment and social justice” in *Supreme But Not Infallible*, *supra* n.8.

sanction, the Court has treated this issue as having no juridical basis.<sup>51</sup> This could be contrasted to the attitude of the Court relating to housing rights when it suddenly discovers that financial implications do matter for enforcement.<sup>52</sup> What could explain this inconsistency?

## II. Explaining the mixed judicial record: Judicial Governance and the ideology of judging

What then can explain why the one of the most activist courts in the World is biased in favor of some rights while ignoring the rest? What can explain the urban or class bias? For one answer, I suggest that we look to what I call ‘judicial governance’. By this, I mean *the emergence of governance functions assumed by the Court in the face of a failing or failed state apparatus that proves unwilling or is incapable of carrying out its mandate under the law and the Constitution*. The Supreme Court has increasingly assumed this function since the early 1970s and in that process, come to share many of the biases that are inherent in process of governance itself.<sup>53</sup> Let me explain.

During the first two decades of its history, the Court was largely positivistic, strictly interpreting the Constitution using the traditional canons of statutory interpretation. As the legal expert Rajeev Dhavan puts it, “there was never any great dissonance between

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<sup>51</sup> For example, see the remarks of the Court in *Municipal Council Ratlam v. Vardichan* AIR 1980 SC 1622; *M.C. Mehta v. Union of India*, AIR 1988 SC 1037.

<sup>52</sup> *Olga Tellis*, supra n.2 at 194 (“The State may not by affirmative action, be compelled to provide adequate means of livelihood or work to the citizens.”).

<sup>53</sup> It could be argued that there has always been a contradiction between the Court’s deference to the role of the state in the development process (including its welfare function) and its need to discharge its obligation to uphold the law when the developmental state acts contrary to the law and Constitution. This contradiction is perhaps more manifest after evidence of pervasive state failure began appearing in the 1970s.

Nehru's developmental plan for the Indian people and the positivist theory of law that the British had bequeathed to the courts of independent India. The fact that the Constituent Assembly had scripted a judicially enforceable Bill of Rights into the text of the Constitution did not disturb the positivist credentials of Indian law. The fundamental rights guaranteed to the citizen had been perceived as essentially 'legal rights' granted by a super statute: each one of the rights had been hedged in by limitations and was interpreted like any other statute".<sup>54</sup> This positivist approach could be seen, for instance in *A.K.Gopalan* case<sup>55</sup> while interpreting Article 21 in a legalistic and narrow manner. This positivist approach to law began to change somewhat during the mid-1960s as can be seen in the *Golaknath* case<sup>56</sup>, once it became obvious that the courts were slowing down needed economic and social reform through their positivist methodology, leading to great tensions between the judiciary and the government. As Justice Subba Rao, CJ, said in *Golak Nath*, "...Articles 32,141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice...To deny this power to the Supreme Court on the basis of some outmoded theory that the court only finds the law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country".<sup>57</sup> Enunciating the 'basic structure' doctrine in *Kesavananda Bharati* case<sup>58</sup> was yet another instance of judicial craft that repudiated its positivist legacy. But the true turn-around

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<sup>54</sup> See Rajeev Dhavan, "Judges and Indian Democracy: The Lesser Evil?" in Frankel Frannicine et al (ed.) *Transforming India: Social and Political Dynamics of Democracy* (Delhi, Oxford University Press, 2000) at 322.

<sup>55</sup> *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27.

<sup>56</sup> *I.C.Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>57</sup> *Id.* At 1668-9.

<sup>58</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

came after the Emergency, when the Court turned away from formalism and positivism entirely, as witnessed in the *Manekha Gandhi* case<sup>59</sup> where the Court fully repudiated *A.K.Gopalan* and launched Article 21 in a new expansive direction.

The Court was doing this against the background of a widespread failure of the state to do socio-economic justice resulting in the emergence of a multitude of social movements across the country, among farmers, peasants and women.<sup>60</sup> The moral credibility of the Congress Party, the grand old party of independence, had collapsed, and the government had lost its legitimacy due to the repression during the Emergency. The Janata government which followed in 1977 was weak. These circumstances, coupled with the Court's own attempt at *mea culpa* for its role during the Emergency, led to the consecration of the judiciary – no doubt self-imagined to some extent<sup>61</sup> – as the preferred branch of governance. The Court's willingness to assume powers of governance, as witnessed in the growth of SAL, also compelled the Court to share the *goals* of governance and tolerate the *methods* of governance, much more than in the past.

One such goal was sustainable development, a concept of development laced with environmentalism. The Court's activism in the environmental area from the early 1980s was not happening in a vacuum, but as part of a state making process that was reconfiguring the goals of the Indian state itself. Following the 1972 Stockholm UN Conference on the Environment, the regulatory authority over forests was transferred from the State list to the Concurrent list in the Constitution in 1976, allowing shared

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<sup>59</sup> *Manekha Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>60</sup> For a discussion of the emergence of social movements from the 1970s, see Gail Omvedt, *Reinventing Revolution: New Social Movements and the Socialist Traditions in India* (1993).

<sup>61</sup> For an extended and sophisticated argument that links judicial power, activism and self-image of the judges, see Upendra Baxi, *supra* n.10.

federal and state authority. The Prime Minister issued a directive in 1980 mandating environmental impact assessments by federal agencies for medium and major irrigation projects. The Indian Parliament passed the Forest Conservation Act in 1980 and the federal environmental department was upgraded to the Ministry of Environment and Forests in 1985.<sup>62</sup> Several Indian environmental NGOs were also established in the 1970s including the Center for Science and Environment and Kalpavriksh, while environmental movements had been witnessed in parts of the country such as the Silent valley agitation and the Chipko movement.<sup>63</sup> Against this background, the Court's environmental activism must be seen as a result of the contestation between different social actors over the meaning and direction of the goals of the Indian state itself.

As a result of the Court's assumption of governance functions, its approach to human rights is determined by its congruence, at any given time, with the overarching ideologies of *statism* and *developmentalism* which remain dominant ideologies of governance. Put differently, the Court is generally loath to find for a petitioner who is asserting rights that openly contradict with either the dominance of the state or with the vision of socio-economic and cultural change that is implied in the grand vision of development. This is

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<sup>62</sup> For a discussion of these developments, see Sanjeev Khagram, "Restructuring the Global Politics of Development: The Case of India's Narmada Valley Dams" in Sanjeev Khagram, James V.Riker and Kathryn Sikkink eds., *Restructuring World Politics: Transnational Social Movements, Networks and Norms* (Minneapolis: University of Minnesota Press, 2002) at 218-219.

<sup>63</sup> On the growth of environmental movement in India, see Ramachandra Guha, "The Environmentalism of the Poor" in Richard G. Fox & Orin Starn eds., *Between Resistance and Revolution* (1997) at 17-39; Harsh Sethi, "Survival and Democracy: Ecological Struggles in India" in Poona Wignaraja ed., *New Social Movements in the South* (1993) at 122-148.

because, the Court, as a governance mechanism, shares the ideologies of statism and developmentalism. The meanings of these ideologies do not remain fixed; rather, they change over time, reflecting the dominant theories and social relations of the day. Thus, developmentalism has meant many things from state-led industrial growth to sustainable development to rights-based development to neoliberal development. Indeed, many of these meanings coexist in tension within the ideological matrix of the state and the judiciary is not free from them. These ideologies enable the Court to justify the sacrifice of some human rights for others and the social costs imposed on some in the interest of others, but to do so for different reasons at different times. Thus, in the *Narmada* case, the Court derisively characterized the *Narmada Bachao Andolan*, the petitioner, as an ‘anti-dam organization’ and declared that the “displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good”.<sup>64</sup> This is one reason why the Court is biased in favor of some rights over others.

A second reason why the Court may be biased in favor of some rights over others has to do with the particular history of the Court’s long tussle with the legislature over the question of property rights. This complex story has been well told elsewhere by scholars<sup>65</sup>, but for our purposes, it must be noted that the Court’s conflict with the legislature starting with the First Amendment to the Constitution and extending until the 1970s did not completely end with the *Kesavananda Bharati* case, but has cast its long shadow over the relationship between Part III and Part IV and the future of socio-

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<sup>64</sup> *Supra* n.24 at 765.

<sup>65</sup> See Granville Austin, *Working a Democratic Constitution* (Delhi: Oxford University Press, 1999).

economic rights. Since most socio-economic rights are listed as policy aspirations under Part IV, the only legitimate measures that may be taken to enforce them are by the government unless the Court decides to read a Directive Principle into Part III, thus enabling individuals to claim their rights, which is something the Court has done often. But that creates a problem as the Court has had a bitter history of conflict with the government over whether the measures taken to enforce Directive Principles must themselves comply with Part III rights. To put it differently, the Court has come to see itself, for historical and textual reasons, principally as the defender of Part III rights especially when weighing governmental measures that seek to give effect to the principles in Part IV. This has resulted in creating a structural bias in favor of civil and political rights which dominate Part III unless the Court decides to read the principles of Part IV into Part III. This could be evidenced, for instance, in the way in which almost all implied rights – livelihood, environment, education – have been read into Article 21 and therefore translated as a civil or political right. Given this history, it is not surprising that the Bar so often frames its arguments in terms of the rights in Part III.

A third reason for the bias of the Court in favor of some rights over others has to do with social movement politics itself. Social movements in India, as elsewhere, tend to be highly suspicious of courts and law because of their perception as elite defenders of the status quo. In the Indian context, this perception is not without reality. As such, social movements tend to approach courts relatively rarely unless they stand to gain immediately either through publicity, or to stave off disasters. Given that social movements tend to be a primary driving force behind the enforcement of most socio-economic rights, this has the result of keeping these rights issues off the Court's agenda.

Instead, the Court is faced with issues that tend to dominate the mainstream NGO agenda, such as torture, custodial deaths, environment and more recently, women's rights.

A fourth reason for the bias of the Court can be found in the individual class and political alignments of judges, as well as their individual training and outlook towards socio-economic issues. The social philosophy of the individual judges often determines the outcomes of cases in India (as elsewhere), where the Court does not sit *en blanc* as in the US, but rather constitutes itself in 2 and 3 judge benches. These benches are also not constant as judges retire very often even as the cases drag on for years. This may mean that a single case may see several judges deciding different aspects. The individual ideology of judges becomes extraordinarily important as a result. A case in point is *Narmada*, where Justice Barucha was the only judge who stayed on the Bench from 1994 (when the case was initiated) to 2000 (when the judgment was delivered). It is not coincidental that he was the sole dissenting judge who found in favor of the NBA. In addition, individual judges often dramatically differ on the extent to which they are receptive to arguments about constitutionalizing socio-economic rights including by reliance on international law. For example, a survey of the Supreme Court judgments shows that the majority of cases in which the Court has referred to the ICESCR have been decided by one judge, K. Ramaswamy, and most of them have been decided since the mid-1990s.<sup>66</sup>

A final reason for the bias of the Court in favor of some rights has to do with the role of the Bar itself. The Indian Bar, while tremendously talented, has not aggressively pushed for adjudication of socio-economic rights and does not seem to draw on the most

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<sup>66</sup> Survey done on SCC CD-ROM, July 2004.

current trends in international and comparative law. As pointed out earlier, the counsel for *Narmada Bachao Andolan* made few, if any, references to the extensive international and comparative jurisprudence on forced eviction. As a result, even in the field of environmental law, the Court has tended mostly to rely on domestic Indian legal sources, and not on the most current comparative and international legal materials.<sup>67</sup> The judgments themselves are often confusing and show a breezy familiarity with international law<sup>68</sup> and do not draw on the experience of some of the most progressive constitutional courts in the world adequately, such as the South African Court. The responsibility for this lies, ultimately, with the Bar which lacks adequate representation from oppressed groups such as *dalits*.

### III. The ideology of human rights discourse and the limits of the Court's value to social movements

A second set of explanations for the bias of the Court against socio-economic rights are to be found within the discourse of human rights itself. This discourse, which is international in origin, is generally taken to be a neutral one in which all rights are

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<sup>67</sup> C.M.Jariwala, "The Directions of Environmental Justice: An Overview" in S.K.Verma and Kusum (eds.) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, Delhi, 2000) at 492.

<sup>68</sup> For instance, many judgments describe that India is a *signatory* to this or that treaty, when what they mean is that India is a state party. There are serious differences in the international legal obligations that accrue after signature as opposed to ratification. In addition, sometimes the Court wrongly refers to international treaties on human rights, and often fails to analyze (as opposed to merely declaring) how the treaty comes to be part of domestic law. For an example, see *LIC of India v. Consumer Education Research Centre*, (1995) 5 SCC 482 (referring to the European Convention of Social, Economic and Cultural Rights and the Convention on the Right to Development for Socio-Economic Justice, which don't exist), para 49.

equal, indivisible and interdependent. Far from this, the conceptualization of socio-economic rights within the human rights discourse is deeply problematic and constrains any judiciary that is mandated to enforce it. It is not my claim here that civil and political rights are more privileged in the language of the human rights treaties than economic, social and cultural rights. That familiar claim<sup>69</sup>, while true, captures only part of the problem. The other part of the problem relates to the way socio-economic rights are conceptualized, and the specific problems that a court is said to encounter while attempting to enforce such rights.<sup>70</sup> To state my argument in a nutshell, socio-economic rights tend to be conceptualized in the international legal lexicon in specific ways that make their realization depend on either *state capacity* to provide such rights or on the availability of market mechanisms that can ensure constantly increasing ‘standards of living’ (as the ICESCR puts it<sup>71</sup>) through greater *consumption*. The choice for realizing socio-economic rights then, is between increasing state capacity on the one hand and a

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<sup>69</sup> For a discussion, see Martin Scheinin, *Economic and Social Rights as Legal Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 41, 42 (Asbjorn Eide et al. eds., 1995). This is distinct from the broader charge that violations of economic and social rights are systematically ignored when compared to violations of civil and political rights. As the UN Committee on Economic, Social and Cultural Rights has put it, “the shocking reality . . . is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.” World Conference on Human Rights, Preparatory Committee, Contribution Submitted by the Committee on Economic, Social and Cultural Rights, UN Doc. A/CONF.157/PC/62/Add.5, para. 5 (1993).

<sup>70</sup> A critical, yet sympathetic, approach to socio-economic rights has been thoughtfully engaged by other scholars before. See e.g., Craig Scott, ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’, 21 *Hum.Rts.Q.* 633 (1999).

<sup>71</sup> ICESCR, *supra* n.32, article 11.

culture-ideology of consumerism, led by market fundamentalism, on the other. In the context of most post-colonial states, increasing state capacity is not an attractive option as it assumes that the state will not be predatory. Markets, by themselves, have no track record of ensuring the socio-economic rights of the poor by encouraging greater consumption.<sup>72</sup> Within this constrained framework, socio-economic rights lose their emancipatory potential, and the Court, no matter how heroic, cannot overcome this framework easily. The ideologies of socio-economic rights in the international legal lexicon overwhelm the constitutional ideologies of equality or justice which may in fact provide space for social movement struggles for realization of rights.

First, what are socio-economic human rights and what were states' attitudes towards them? Socio-economic rights including education, health, standards of living, trade union rights, housing, water, food, cultural identity etc are contained in the ICESCR. As is well-known, unlike the ICCPR<sup>73</sup>, which mandates that all rights should be immediately implementable, the ICESCR subjects the guarantee of rights to two conditions: that they should be "progressively realizable" and that the realization should be subject to "available resources". So-called 3<sup>rd</sup> generation rights are collective or solidarity rights such as the rights to development, environment and peace. The

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<sup>72</sup> In India, there has never been a widespread belief in the idea that markets, by themselves, can ensure socio-economic rights or ensure equitable distribution of resources. If any thing, the Constitution envisages serious state intervention in the economy. This belief in the market's capability, which is widespread among US legal academics, especially of the 'law and economics' variety, is heavily contested now. For an analysis, see Martha McCluskey, 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State', 78 *Ind. L.J.* 783 (Summer 2003).

<sup>73</sup> International Covenant on Civil and Political Rights, 1966.

Universal Declaration on Human Rights<sup>74</sup> (UDHR) makes no distinctions between rights, but due to the ideological rivalry during the Cold War, two different covenants were adopted in 1966 – ICCPR and ICESCR. Underlying each was a deep division over the appropriate role of the state in the economy. The debates during drafting show that while many if not most western states were in support of 2<sup>nd</sup> generation rights in principle, there were serious divisions over the responsibilities of states.<sup>75</sup> Indeed, the covenants, being treaties, were drafted as the legal responsibilities of states. As such, the concern during the drafting of the covenants was not so much whether socio-economic rights were important for human dignity (a major goal of the effort) but whether the states could afford to guarantee them. In other words, the human rights debate became one about *state capacity* rather than human dignity.<sup>76</sup> In the context of the 1960s, this was then a debate about the appropriate developmental role of the state – a proxy war between the dirigist and market-oriented models of economy.

In this debate, so-called developing countries – at least those that were decolonized – were mostly supportive of a strong role of the state in the economy. The reason was that these newly independent countries were terribly interested in nation building and saw the state as the main instrument for achieving economic and social development, so that they could “catch up” with the west. India was no exception. Vesting the state with the obligation to ensure housing, education or standard of living for

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<sup>74</sup> Universal Declaration of Human Rights, GA Res. 217A (III), Art. 25 (1), UN Doc. A/810, at 71 (1948), *available at* <<http://www.unhchr.ch/html/menu3/b/69.html>>.

<sup>75</sup> Farroukh Jhabvala, “On Human Rights and the Socio-Economic Context”, in Frederick E. Snyder and Surakiart Sathirathai (eds.) *Third World Attitudes Toward International Law* (Dordrecht: Martinus Nijhoff, 1987).

<sup>76</sup> For a longer discussion of the points outlined here, see Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003), Part III.

its citizens, gave a moral justification for the developmental role of the state. This is important to bear in mind, as the developmental role of the state has been substantially delegitimated now both due to the miserable record of the developmental state in the third world (its violence) and the triumph of neoliberal ideology that dictates the almost complete withdrawal of the state from the economy.<sup>77</sup> In this context, a state that is fully committed to the entire panoply of human rights including socio-economic rights appears to stand a better chance of ensuring development and progressive state building – as is evidenced by South Africa – but it would require that socio-economic rights be recast first.

So-called 3<sup>rd</sup> generation rights began emerging in the context of intense North-South politics in the 1970s. The failure of the Non-Aligned Movement and the G-77 group of countries to push the New International Economic Order (NIEO) debate to any real results during the 1970s meant that the Third World states needed some other ideological basis for contesting the power and influence of the West. They turned to human rights discourse to resignify the debate about development. Starting with the Declaration of Tehran of 1967, this gained momentum and agencies such as UNESCO and ILO played a key role in pushing the debate on human rights and peace and human rights and development during the 1970s. After the articulation of the right to development in the 1970s and after almost a decade of intense transformation in UN practice, the UN General Assembly adopted the Declaration on the Right to Development in 1986. By that time, a right to peace had been already declared.

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<sup>77</sup> See Ashis Nandy, “State” in Wolfgang Sachs (ed.) *Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books, 1992).

Thus the ideological debate about development had shifted terrain and now had fully arrived in the area of human rights. It is well-known that the 1986 Declaration on Right to Development was ideologically polarized (US voted against with some western countries abstaining) and has proved to be controversial ever since. The impact of the new developmentalization of human rights was quite profound. First, it was during the 1970s that the UN doctrine on the ‘interdependence, indivisibility, and interconnectedness of all human rights’ became official. This meant that officially at least, the debates about the hierarchy of human rights, and tradeoffs between human rights, had been settled. Second, the embrace of human rights by Third World states at the diplomatic level, and the entry of new Third World states into the UN Commission on Human Rights in 1979, had domestic repercussions and led to demands for more democracy and human rights within states. This political background to socio-economic rights is crucial for appreciating the criticisms leveled at socio-economic rights as well as the limitations inherent in their conceptualization due to their historical trajectories.

What are some of the traditional criticisms of socio-economic rights?

Traditionally, mainstream international lawyers in the West have been rather dismissive of socio-economic rights and Western state practice has also been often hostile to these rights<sup>78</sup> though there is now an attempt to engage in revisionist history wherein the US in particular,<sup>79</sup> was only promoting economic and social rights when it pushed for free

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<sup>78</sup> I am not flooding this paper with too many citations for much of what follows as its broad arguments are well rehearsed in the field of human rights. For one example of some traditional tensions in the field of socio-economic rights, see J. Oloka-Onyango, ‘Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa’, 26 *Cal. W. Int’l L.J.* 1 (Fall 1995).

<sup>79</sup> Thus, according to the Attorney Advisor to the Department of State, “during the Cold War, Western governments championed democratic institutions and the operation of the

markets during the Cold War. Leading NGOs such as Amnesty International and Human Rights Watch have also begun recasting their mandates to deal more directly with economic and social rights, though they continue to express doubts.<sup>80</sup> I list some well-known and oft-discussed criticisms of economic and social rights here that seem most relevant to the context in India, including the following, while providing my assessments of those critiques:

- a. A first criticism is that socio-economic rights do not fit conceptually within the idea of rights, which are generally taken to mean negative liberties rather than positive entitlements. Never highly persuasive, this criticism has two major problems. First, the idea of rights as negative liberties alone is a highly narrow and almost ethnocentric one that reflects a particular western tradition and cannot therefore, serve as the basis of universal rights. Second, even negative liberties turn out to have positive entitlements – for example, the right to fair trial requires the provision of legal representation to those who cannot afford any under the ICCPR. So, conceptually, the idea that human rights are the rights to be left alone does not hold much water even if we take classic civil and political liberties.<sup>81</sup>
- b. A second critique is that socio-economic rights are not rights, but aspirations of what a desirable society looks like. Proponents of this critique, who include many

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free market as the means to implement economic and social rights”. See Michael J. Dennis, “Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council”, 97 *A.J.I.L.* 364 (April 2003).

<sup>80</sup> See e.g., Kenneth Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues faced by an International Human Rights Organization’, 26 *Hum.Rts.Q.* 63 (2004).

<sup>81</sup> For a discussion, see Herman Schwartz, ‘Do Economic and Social Rights Belong in a Constitution?’, 10 *Am. U. J. Int’l L. & Pol’y* 1233, 1233 (1995).

American constitutional lawyers such as Cass Sunstein<sup>82</sup>, criticized the Eastern European states for enshrining socio-economic rights in their constitutions. The major problem with this critique is that it equates socio-economic rights with the welfare state, a massive statist enterprise to provide public housing, free education, health and massive subsidies for food etc. This has a rich tradition even in human rights scholarship, which often conflates socio-economic rights with the welfare state, as *rights to government programs*<sup>83</sup>. Reducing socio-economic rights to welfare statism or government programs simply reenacts the same flaw that characterized the birth of the covenants in 1966 when the debate about rights became a debate about state capacity. In addition, a strand of this critique also equates socio-economic rights with the freedom to acquire goods, or simply greater consumption. In areas like health or housing for example, one can see a clear evidence of this tendency. In this guise, socio-economic rights simply become equated with marketization and the freedom to ‘choose’ goods in the market. This is how, for example, the World Bank has conceived its own role vis-à-vis socio-economic rights in recent years.<sup>84</sup> If the former strand of this critique aims at supply-side solutions to violations of socio-economic rights, the latter strand offers demand-side solutions. If we stop seeing rights-holders as passive recipients of government benefits or as inexorable consumers, but rather as active

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<sup>82</sup> Cass Sunstein, ‘Against Positive Rights’, 2/1 *East.Eur.Const. Rev.* 35 (1993). He has since changed his position and is now a supporter of economic and social rights. See Cass Sunstein, *The Second Bill of Rights: FDR’S Unfinished Revolution and Why We Need It More than Ever* (Basic Books, 2004).

<sup>83</sup> E. Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’, 9 *Netherlands Ybk. Int. L.* 69 (1978).

<sup>84</sup> See e.g., World Bank, *Human Rights and Development: The Role of the World Bank* (1998).

shapers and enforcers of their own rights through vigorous democratic participation, the hollowness of this critique is exposed. In fact, *a really meaningful socio-economic rights agenda must rest on a strong critique of welfare statism, market fundamentalism and the culture-ideology of consumerism.*

I would suggest that this is in fact the emerging meaning of socio-economic rights as can be seen from recent dissident strands of constitutional and international jurisprudence as well as the practice of social movements that are discussed in the next section.

- c. A third critique is that socio-economic rights are not justiciable or as the ICESCR puts it, the rights are “progressively realizable” within “available resources”.<sup>85</sup>

The argument is that this is both because it costs money to implement them, and also because judges lack the legitimacy, competence and the power to meaningfully address them. I deal with the latter part of the critique in the next section. Regarding the first part, it can be easily rebutted. As Henry Shue and others have shown, it takes a lot of money to implement most civil and political rights such as the right to vote simply because the enjoyment of these rights requires a sophisticated infrastructure of state agencies and civil society actors.<sup>86</sup>

Socio-economic rights are no different. Besides, it is increasingly recognized that the enjoyment of socio-economic rights rest not so much on resources as in the

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<sup>85</sup> Article 2(1). The key issue in international human rights law concerning economic and social rights today is the issue of justiciability, but at the international level. Thus, the Commission on Human Rights and the ECOSOC have authorized the creation of a Working Group to consider the conclusion of an Optional Protocol to the ICESCR that could receive individual complaints. See CHR Res. 2002/24 (Apr. 22); ECOSOC Dec. 2002/254 (July 25). The focus of my article is more on the domestic judiciary.

<sup>86</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2<sup>nd</sup> ed)(Princeton, N.J.: Princeton University Press, 1996).

lack of voice/power. In Amartya Sen's language, the entitlements depend on capabilities, which in turn are a product of disabilities imposed by race, gender, class, ethnicity and variety of other social, political, economic and cultural dimensions of life.<sup>87</sup> As Sen has pointed out, the life expectancy of American blacks is lower than the people in Kerala, even though the US is so much wealthier than India in per capita terms.

- d. A fourth criticism is that there is a hierarchy among rights and socio-economic rights do not rank at the top. The idea of hierarchy of rights comes in different forms in international law. It can be seen in the notion of *jus cogens* for example, that confines its meaning to certain massive human rights violations such as genocide or even prohibition of torture, but does not include other massive human rights violations as hunger or forced eviction/destruction of housing. It can also be seen in the idea that certain rights are core rights while others are not. Even in specialized areas of human rights such as those relating to labor, the idea of core standards is prevalent.<sup>88</sup> If we look at what these are, they invariably turn out to be civil and political rights (freedom to organize for instance) but not socio-economic rights (such as occupational health). The idea of core rights is not only arbitrary, ideological and biased, it is also dangerous, as it shows a green signal for violation of other rights by states and other actors.

In addition to the problems that are inherent in the conceptualization of socio-economic rights, it is also often suggested that there are also specific problems relating to

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<sup>87</sup> Amartya Sen, *Development as Freedom* (1999), chapter 1-4.

<sup>88</sup> See ILO Declaration on fundamental principles and rights at work, June 1998, available at [www.ilo.org](http://www.ilo.org).

their enforcement by courts. What are some of these problems? So-called 3<sup>rd</sup> generation rights have rarely come before the courts though, as I have noted earlier, the right to environment has been interpreted by the Court to be part of right to life under article 21 of the Constitution. Socio-economic rights have been litigated for years before domestic courts. Learning from this experience, one can reflect on some additional criticisms of socio-economic rights that are traditionally made from the perspective of judging.

These criticisms are three fold.<sup>89</sup> First, it is mentioned that judges lack the legitimacy to adjudicate socio-economic rights because they are not elected representatives of the people. The reason why this is important is that the determination of socio-economic rights is said to require decisions of a budgetary nature, which are supposed to be left to other branches of government. Ordering the enforcement of a right to housing will, in this view, unnecessarily intrude into the domain of the legislature and the executive by shifting resources from other areas. Second, it is alleged that judges lack the technical competence to adjudicate socio-economic rights as they require mastery of complex social and economic policies and often massive amount of data. It is advised that judges should leave this complex task to administrative agencies that have the competence to do it. A third critique is that a judicial approach to the enforcement of socio-economic rights is not the right way to their realization as it is too fragmentary, sporadic and lacks the scale required to address massive problems such as illiteracy or slums.

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<sup>89</sup> See Sunstein, *supra* n.57. For an illuminating description of the major objections to the judicialization of social rights, see Frank Michelman, 'The constitution, social rights, and liberal political justification', *I-CON (International Journal of Constitutional Law)*, Volume 1, Issue 1, January 2003 at pp. 13-34. See also Craig Scott and R.Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution?' 141 *U. Penn. L. Rev.* 1 (1992).

None of these critiques hold much water. First, while adjudicating civil and political rights, the judges make decisions that have serious budgetary implications as well. For example, ordering an improvement in prison conditions or mandatory legal representation costs money and may not reflect the existing law. If judges can do this, why can't they order improvements in socio-economic rights that have budgetary implications? Also, the elected representatives themselves often lack legitimacy and courts may be no more or less legitimate than undemocratic or corrupt representative institutions. Finally, legitimacy is not simply a product of elections, but could also be seen as a product of fidelity to core constitutional values or global ethics. A court may in fact be upholding this conception of legitimacy when it decides that the constitution requires the enforcement of socio-economic rights even against existing law or policy.

Second, the question of competence of judges over economic and social policies is also a ruse. Administrative agencies and often legislators are often equally incompetent over the details of economic and social policy and yet they take crucial decisions that shape public policy. Besides, adjudication of commercial and related matters such as antitrust or tax requires a great deal of technical skill that judges are allowed and even expected to have. If they can do so in commercial matters, why can't they do the same in adjudicating socio-economic rights?

Third, the problem of scale, that an adjudicatory approach to socio-economic rights is not by itself adequate, is a serious critique. An excessive reliance on the judiciary to realize socio-economic rights is certainly bad and will not address systemic problems such as chronic health crises, massive poverty, homelessness etc. However, this critique wrongly assumes that countries put all their policy eggs in the judicial

basket. No country in the world does so and India certainly does not do so. In fact, most countries have massive social and economic programs geared to address chronic problems in society that constitute socio-economic rights violations. These are often supported and expanded by many civil society actors such as NGOs. The role of the court is by definition, a limited and supplementary one even in countries such as India where massive public-private programs are put in place to address poverty, homelessness, AIDS crisis and so forth, and the Court must often take on an administrative law model of judging to monitor the delivery of government programs.

While the traditional criticisms of socio-economic rights continue to matter, there are whole range of new issues that have arisen regarding the conceptualization and enforcement of these rights, as well as the actors on whom liability may be imposed for violations. The context for these new issues lies in greater social movement struggles over socio-economic rights. These new issues must be properly understood and appreciated by judges, if socio-economic rights are to be successfully and sustainably realized.

By now it is obvious that one of the major reasons for the weakness of socio-economic rights is the extent to which these rights have been reduced to either building state capacity or to consumerism. Put differently, socio-economic rights have been the victims of the ideology of development and so-called 3<sup>rd</sup> generation rights have especially become a proxy for the frustrations of Third World states due to their failure to achieve a NIEO. This is unfortunate, and the whole regime of human rights needs to be freed from the stifling ideological baggage of the 1960s that continues to bedevil it. That ideological baggage saw development in macroeconomic terms, a matter of large capital-intensive

projects, import substituting industrialization, a large state presence in civil society including control of unions, a single party structure, weak judiciaries, a nation-building ideology, a commitment to the rationale of ‘catching up’ with the West, and the valorization of the national identity over all other identities. *Contesting the ideology of development is central to this task* and it has not truly begun except in the periphery in the form of social movement action in the Third World.<sup>90</sup> In the eyes of social movements, which consist of the most vulnerable and poor populations in the Third World, it is the attempt to impose ‘development’ on them that have made them worse off. Development is, in this view, the disease rather than the cure. Without performing this cathartic task, socio-economic rights will simply continue to be seen as the best way to sneak a gigantic welfare state in, while so-called 3<sup>rd</sup> generation rights will continue to be seen as a replay of a tired old debate over technology transfer, greater development assistance and better terms of trade. While a welfare state and the goals of the NIEO may continue to be important, they must be sought elsewhere and through different channels, and not through the human rights discourse.

A second challenge is to reconceptualize the background norms of private law – including property, contracts and tort – that underlie the operation of the market which produces and perpetuates poverty, domination and exclusion.<sup>91</sup> This is perhaps the most difficult challenge in making socio-economic rights a reality to those to whom they matter most. The regime of human rights, including socio-economic rights, has

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<sup>90</sup> For an earlier elaboration, see Balakrishnan Rajagopal, ‘International Law and the Development Encounter: Violence and Resistance from the Margins’, (1999) *American Society of International Law 93<sup>rd</sup> Proceedings* 16.

<sup>91</sup> For a discussion in the context of socio-economic rights, see Mark Tushnet, ‘State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations’, 3 *Chi. J. Int’l L.* 435 (Fall 2002).

traditionally been conceived of as a regime of public law, with very little bearing on private law. Thus, human rights were conceptualized in the classical tradition as rights of individuals against the state and in the absence of any state action, violations of individual rights by other private actors were – and still are - not considered violations of human rights. This nexus with the state, while reflecting its classical liberal roots, makes the classical doctrine of human rights less useful and relevant in a Third World country such as India. Many human rights violations, including most violations of socio-economic rights, occur in the private arena of the market or the family, and the rules that structure social relationships in these arenas have been largely untouched by the moral impulses of the human rights regime. This is particularly true in India where the teaching and the practice of private law follows a very doctrinaire, Blackstonian path with little regard to the outcomes of private law transactions on the most vulnerable. An added source of illegitimacy in the post-colonial context of India is that these private law regimes mostly remain unchanged from the colonial period and perpetuate the exploitation and domination that these regimes were set up to perpetuate.

A third challenge is the clear rise of non-state actors in international politics. Both transnational corporations as well as transnational social movement networks now have profound impact on international law and politics. The former wield enormous power over national governments while the latter have transformed the space of law making and implementation. During the last decade, social movements have compelled the adoption of a major treaty (Ottawa Convention on Antipersonnel Landmines), created new international institutional innovations (World Bank Complaints Panel, World Commission on Dams, Commission on Sustainable Development, IMF Ombudsman) and

other multistakeholder initiatives (Mining Review, Global Compact, corporate social responsibility movement including actors such as Global Reporting Initiative) and transformed compliance mechanisms (especially in environmental law).<sup>92</sup> In addition, social movement action also led to the 1996 advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons<sup>93</sup>, as clearly recognized by international lawyers<sup>94</sup>. Many, if not most, of social movement action has been targeted towards the enforcement of socio-economic rights. This new form of politics will inevitably have a profound impact on the Indian Supreme Court soon if only because Indian social movements are so deeply embedded in transnational networks. It is imperative that judges remain conscious about how their constituency is rapidly changing from an exclusive club of domestic public interest groups suing local authorities to a range of transnational social movement networks that take on transnational actors such as corporations and even international agencies. That is likely to emerge as the frontline of socio-economic adjudication and the Court is likely to be a site of contention.

A fourth new issue that must be noted is the rising concern about the increasing incompatibility between fundamental norms of international law relating to human rights and other aspects of international law that promote economic globalization.<sup>95</sup> In particular, conflicts are emerging between the international trade regime on the one hand

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<sup>92</sup> See Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of theorizing resistance' 41 *Columbia Journal of Transnational Law* 397 (2003).

<sup>93</sup> See *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports (1996).

<sup>94</sup> Richard Falk, "The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society", in Richard Falk, *Law in an Emerging Global Village* (1998) at 165-188.

<sup>95</sup> For an analysis, see Christiana Ochoa, 'Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse', 23 *B.C. Third World L.J.* 57 (Winter 2003).

and norms protecting human rights and environment on the other. Similarly, conflicts have emerged between the policies of the Bretton Woods institutions and norms of international law in the area of human rights and environment. The Court cannot remain oblivious to these developments. As India enforces its obligations under the WTO regime of treaties through the enactment of statutes, the Court is likely to see legal challenges to these statutes on the ground, inter alia, that they violate international human rights law and the Court must decide that conflict between trade law and human rights law. In other words, the Court cannot simply call for incorporating international law into domestic law in cases involving human rights, when there are several unresolved issues concerning the incorporation of other branches of international law into domestic law as well as the relationship between different branches of international law once they are incorporated into domestic law. The Supreme Court has not begun paying attention to these issues nor has the Bar begun engaging with them. In addition, questions are increasingly arising about the legal responsibilities of international institutions such as the WTO, World Bank and the IMF, which remain oblivious to the broad obligations of all actors under international law to respect human rights. These organizations are not subjected to the jurisdiction of the Court. Due to their diplomatic immunity, they cannot be sued in national courts even when they violate human rights norms through their policies and projects. To address this partially, the World Bank established the Complaints Panel in 1993 but that body is not a judicial one. It does not apply international law; rather it simply checks if the projects complained of have violated World Bank's own internal policies known as 'operational directives'. The IMF's Ombudsman is even weaker and does not allow complaints from individuals to be

entertained. The WTO has no mechanism for complaints by individuals or groups from states that lose in its proceedings. The impartiality and independence of WTO panels and Appellate Body leave a lot to be desired and poor countries – let alone vulnerable groups within these countries – have very little if any, say in how WTO is run. Yet, these organizations have profound impact on human rights of poor people, farmers, women, minorities and indigenous groups, fishermen/women and other vulnerable groups. These impacts are mostly on the livelihoods and cultural identity of these groups and individuals. The last refuge of these groups and individuals is often the Supreme Court and the Court must begin to fashion a jurisprudence of remedies for wrongs that are attributable to overseas entities. Indeed, it is not inconceivable that the decisions of international bodies – whether the Security Council or the WTO – may end up being reviewed by domestic constitutional courts such as the Indian Supreme Court in the future, involving difficult questions of balancing different aspects of international law in domestic enforcement. In many of the new areas of challenge, adjudication is some way off and even if begun, it may not immediately and by itself change the profound inequities of the international system with its maldistribution of resources, gender and race oppression and assaults on cultural identities. On the other hand, an activist judiciary may make an important difference to the politics of reform in many social and economic areas by compelling national states and international agencies to acknowledge that there are limits to what they can do even in the name of ‘progress’ or ‘development. Judicializing socio-economic rights may also serve to recover human rights from its self-imposed limitations, by aiding the political and social demands of social movements but only so long as socio-economic rights are reconceptualized, as I have argued.

#### IV. Judicial activism on socio-economic rights and social movements: Lessons from abroad

The first priority is to begin reconceptualizing socio-economic rights and recentering them as mobilizing strategies, as I have argued. Without doing this, entrenching socio-economic rights in the Constitution or importing international human rights through judicial interpretation, will only reproduce arguments for state capacity or market fundamentalism. In other words, an unquestioning embrace of socio-economic rights will hardly result in progressive politics.<sup>96</sup> If this task is commenced, courts may actually be able to use the category of socio-economic rights for assisting positive social change. But this task lies far ahead. For example, it is well known that there is little by way of international jurisprudence on socio-economic human rights. This is partly because the institutions that can potentially have the maximum impact on these rights are declining competence while existing international courts are skewed in favor of civil and political rights or confined to specific territorial jurisdiction as in the case of the International Criminal Tribunals for former Yugoslavia or Rwanda (ICTY/ICTR). The ICJ, the Law of the Sea Court as well as the newly established International Criminal Court (ICC) are not much relevant in protecting socio-economic rights, with some exceptions. The ICJ hears only disputes between states and with some exceptions (to be discussed below), has not ruled in any significant way on these rights. The Law of the Sea Court could potentially have a major impact on socio-economic rights, but has been

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<sup>96</sup> For an example of such an approach, see Andras Sajó, 'Socioeconomic rights and the international economic order', 35 *N.Y.U. J. Int'l L. & Pol.* 221 (Fall 2002).

established only very recently. The ICC does not concern itself with everyday violations, and is, in any case, unlikely to take up even massive violations of economic or social rights per se, unless it is in the course of armed conflict. The institutions that can have the maximum impact on these rights include the IMF, the World Bank and the WTO. However, the World Bank has consistently maintained that it is prohibited by its articles of agreement from considering 'political' factors though in recent years it has moved to embrace a narrow, market-oriented version of human rights and rule of law as part of its mandate. Its Complaints Panel does not apply any international law to evaluate Bank projects, as I noted earlier, though some of its recent findings show an acute awareness of the ethical basis of critical World Bank policies relating, for example, to indigenous peoples. In a recent finding on the Qinghai project in China, the Panel found that the poverty reduction project had failed to count entire towns of ethnic Tibetan minorities as part of project displaced<sup>97</sup>. On the whole, however, the Panel remains weak and of little relevance to what the Bank does. The IMF has also consistently refused to consider human rights impact of its policies though it now considers poverty impact, gender impact and environmental impact of its policies. The WTO has explicitly refused to consider human rights impact of its policies and treaties though the purpose of international trade is, according to the Marrakech agreement that established the WTO, the increase in employment, human welfare and prosperity. In addition, most of these organizations function in secret and therefore make it impossible to evaluate what sort of factors are taken into account in their decisions.

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<sup>97</sup> World Bank Complaints Panel Report on The Qinghai Project (China: Western Poverty Reduction Project), April 28, 2000, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf>.

Existing international mechanisms of a judicial character such as the UN Human Rights Committee (HRC) do not deal with socio-economic rights due to their subject matter jurisdiction. There is in fact no international court right now, which has jurisdiction over these rights. The Committee on socio-economic rights under the ICESCR is not a court and does not receive complaints like the HRC though its general comments and comments on country reports have been very helpful in developing the jurisprudence in this area. The International Court of Justice (ICJ) has had very little to say on these or any rights though some recent judgments give some hope. In *Hungary v. Slovakia*<sup>98</sup>, the court was able to expound on the dispute between the two nations over the construction of a dam on the river Danube, and state responsibility for non-performance of treaty obligations. The majority opinion as well as Judge Weeramantry's concurring opinion made an important contribution by rearticulating the legal basis for the principle of sustainable development in international law. By creatively interpreting this principle, the opinion showed the intricate connection between environment, human rights and cultural survival. Similarly, in the 1996 *Nuclear Weapons* advisory Opinion, the ICJ has explicitly recognized the right to environment, a so-called 3<sup>rd</sup> generation right, as a human right<sup>99</sup>. Again, Judge Weeramantry's dissent stands out as a classic in exploring the impact of nuclear weapons on socio-economic rights. Finally, in *Botswana v. Namibia*<sup>100</sup>, Justice Weeramantry's dissent shows how even in a matter that is as traditional as boundary delimitation, communal property ownership by indigenous

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<sup>98</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ, Judgment of 27 September 1997 (Merits) available at <http://www.icj-cij.org/>.

<sup>99</sup> *Legality Of The Threat Or Use Of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, available at <http://www.icj-cij.org/>.

<sup>100</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ, Judgment of 13 December 1999, available at <http://www.icj-cij.org/>.

peoples cannot be trumped arbitrarily by international law and how principles of environmental law and equity serve to shape outcomes.

Other international courts such as the ICTY and ICTR or the HRC have had little to say about socio-economic rights due to their subject matter or territorial jurisdiction, though the ICTY has, in some judgments, clearly recognized forced eviction of minorities as a gross violation of international law relating to housing, among others<sup>101</sup>. This interpretation, which follows international law as reflected in UN documents (such as the reports of the UN Special Rapporteur on Right to Housing), shows how humanitarian law can be creatively applied to socio-economic rights when there is evidence of massive or gross violation based on race, ethnicity, gender or any of the other prohibited grounds under Article 2 of the ICESCR.

The encouraging trends in the area of socio-economic rights come from at least four directions:

- a. Comparative constitutional adjudication: Several domestic courts have recently passed important judgments in the area of rights to health, housing, property, education, environment, livelihood, and other related socio-economic rights. Most prominent among them is the South African (SA) Constitutional Court, which has now achieved a well-deserved reputation for passing landmark

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<sup>101</sup> *Prosecutor v. Tadic*, 105 ILR 419 IT-95-17/1 (Appeals Chamber) (21 July 2000) (involving forced eviction and destruction of housing); *Prosecutor v. Tihomir Blaskic*, IT-95-14 (Trial Chamber I) (3 March 2000) (involving, inter alia, forced displacement and destruction of housing); *Prosecutor v. Goran Jelusic*, IT-95-10 (Trial Chamber) (14 December 1999) (involving, inter alia, forced displacement and destruction of housing); *Prosecutor v. Tadic*, 105 ILR 419 (Appeals Chamber) (15 July 1999) (involving, inter alia, forced displacement and forced relocation).

judgments in the area of socio-economic rights which are justiciable under the South African Constitution, unlike the Indian constitution.<sup>102</sup> In three landmark judgments in recent years, *Soobramoney*<sup>103</sup>, *Grootboom*<sup>104</sup>, and the *HIV Treatment Action Campaign* case<sup>105</sup>, the South African court has made important contributions to the growth of socio-economic rights jurisprudence. I cannot discuss these cases in detail due to lack of space, but one novelty of *Grootboom* and the *HIV Treatment Action Campaign* cases is the indirect endorsement by the court of the idea of core minimum standards for socio-economic rights, by arguing that any housing plan that doesn't provide for the short-term needs of the most vulnerable is not 'reasonable'. The idea of core minimum standards, which had been articulated by the Committee on Economic, Social and Cultural Rights in 1990<sup>106</sup>, postulated that even though socio-economic rights are progressively realizable subject to available resources, there is a core minimum of each right that must be assured to each individual by the states especially when the

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<sup>102</sup> This does not mean, of course, that the judgments have had a real impact on the ground. The *Grootboom* case, for example, has been criticized for having had very little impact on the families who filed the suit as well as on the housing situation for the poorest, partly because it was not backed by a strong social movement. Contrasted to this is the *HIV Treatment Action* case which has been backed by a strong social movement and had a major and immediate impact on thousands of lives. The issue of the complex relationship between judicial activism and social movements is beyond the scope of this paper and is the subject of a longer comparative study I am conducting.

<sup>103</sup> *Soobramoney v. Minister of Health (Kwazulu-Natal)*, CCT 32/97, 27 November 1997.

<sup>104</sup> *Government of R.S.A. v. Grootboom*, CCT 11/00, 4<sup>th</sup> October 2000.

<sup>105</sup> *Minister of Health & Others v. Treatment Action Campaign & Others*, CCT 8/02, 5 July 2002.

<sup>106</sup> General Comment No.3, Committee on Economic, Social and Cultural Rights, Report on the Fifth Session (26 November-14 December 1990), Economic and Social Council, Official Records, 1991, Supplement No 3, UN Doc E/1991/23, at para 10.

population concerned is very vulnerable and/or in crisis. The South African court explicitly distanced itself from that position but ended up reaching a similar outcome by its reliance on the notion of ‘reasonableness’. Indeed, the *Grootboom* case could be seen to endorse the highly limited traditional framework of human rights law, which reduces socio-economic rights to mean a right to government programs, as I argued above. Nevertheless, the judgments of the South African court have had a major moralizing influence on discussions about socio-economic rights, partly because the Court’s activism has been part of a larger social movements-led mobilization for social justice within South Africa. Its opinions carry a great deal of importance not only because South Africa is the world’s first human rights-oriented state, but also because its constitution expressly allows the court to consider international law in its interpretation. This has allowed the growth of judicial globalization, as the court freely borrows from the jurisprudence of the UN Committee on Economic, Social and Cultural Rights as well as the jurisprudence of other countries such as India, Canada or Germany.

b. Constitutionalization of rights: Constitutions or amendments adopted since the late 1980s have often incorporated new rights such as the right to environment (Mongolia, South Africa), communal property rights for indigenous people and rights to cultural identity (Colombia, India), local self government (India, Brazil) and right to education (India).<sup>107</sup> This trend is indicative of a new sensibility about the increasing importance of socio-economic rights as universal human rights. The Supreme Court could take this development into account especially

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<sup>107</sup> See texts of Constitutions at <http://confinder.richmond.edu/>.

while interpreting customary international law or general principles of international law, but so far it has not shown that it wants to do so.

c. Regional jurisprudence: Regional courts have been active in pushing the boundaries of human rights to include socio-economic rights. The European Court of Human Rights has decided a number of recent cases on the right to housing, forced evictions and right to property, especially those that involve discrimination on prohibited grounds – both violations of article 8 of the Convention (right to privacy/home) as well as article 1 of Protocol No.1 (right to property/possessions).<sup>108</sup> The Inter American Commission on Human Rights and the Inter American Court on Human Rights have been active in this regard. While several of the latter Court’s opinions remain relevant for the growth of socio-economic rights jurisprudence – such as *Velasquez Rodriguez* case which established the liability of non-state actors for human rights violations<sup>109</sup> – a recent decision stands out. In *Awas Tingni*<sup>110</sup>, the Inter-American Court declared that Nicaragua had violated the right to property and the right to judicial

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<sup>108</sup> See e.g., *Selcuk and Asker v. Turkey*, App.No. 00023184/94; 00023185/94, Judgment 24 April 1998; *Ilic v. Croatia*, App.No. 00042389/98, Judgment 19 September 2000; *Brumarescu v. Romania*, App.No. 00028342/95, Judgment 28 October 1999; *Kopecky v. Slovakia*, App.No. 00044912/98, Judgment 28 October 1999; *Iatridis v. Greece*, App.No. 00031107/96, Judgment 25 March 1999; *Akdivar and Others v. Turkey*, App.No. 00021893/93, Judgment 16 September 1996.

<sup>109</sup> *No.1 - Velásquez Rodríguez Case*. Preliminary Objections. Judgment of June 26, 1987. See also Report N° 40/00, Case 10.588 *Isabela Velásquez and Francisco Velásquez*, CASE 10.608 *Ronal Homero Mota et al.*, Case 10.796 *Eleodoro Polanco Arévalo*, CASE 10.856 *Adolfo René and Luis Pacheco Del Cid*, and Case 10.921 *Nicolás Matoj et al., vs. Guatemala* (13 April 2000)); *Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities*, Case 11.713, Report N° 90/99, Inter-Am. C.H.R.; *Maya Indigenous Communities and Their Members*, Case 12.053, Inter-Am. C.H.R., OEA/Ser./L/V/II.111 doc. 20 rev. (2000) (Annual Report 2000).

<sup>110</sup> *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am Ct. H.R. (Ser. C) No. 79 (2001).

protection (or *amparo* remedy) under the American Convention by not demarcating and titling the land of Awas Tingni community speedily, by granting a logging concession to a company over their land and by denying speedy justice when they complained. This decision has profound implications for different areas of international and domestic law including the law of indigenous peoples, the law of sustainable development, human rights, and even on the conception of sovereignty.

d. Social Movements: A fourth trend is the growing strength of social movements domestically and internationally and their greater ability and willingness to use legal forums to wage their battles. In the *Awas Tingni* case for example, a transnational coalition of indigenous rights was actively involved in litigation. Similarly, the HIV Treatment Action case in South Africa was part of a global struggle waged by a transnational social movement with strong domestic roots to ensure affordable access to drugs for HIV patients. Domestically, many of the recent trends referred to here (for example, the constitutional reforms in Colombia) have been driven largely by social movement action. These movements are overwhelmingly focused on the realization of socio-economic rights. In the face of such energy, courts cannot, for long, resist being engaged in these issues.

## V. Conclusion

I have argued in this essay that the Indian Supreme Court's record in protecting human rights shows a bias against socio-economic rights of the poor and the dispossessed and that this bias may be explained by two sets of factors: a first set of factors, internal to the Indian system, that have positioned the Court as an organ of governance, thereby sharing the biases of many of the goals and methods of governance itself; and a second set of factors that derive from the biased nature of the human rights discourse itself. I have also argued that recent international and comparative judicial experience has much to offer the Indian Supreme Court to transform its jurisprudence into a more people-friendly one. Socio-economic rights do not have to remain as second-class rights to which courts pay lip service and even that only so long as they fit into a developmentalist world view. However, in order to do so, these rights must themselves be reconceptualized to move away from market fundamentalism, state fetishism and the culture-ideology of consumerism. They must, instead, be refashioned as counter-hegemonic mobilizing strategies in which the Court and social movements partner to achieve social justice. The Court must also begin to pay more attention to emerging dimensions of socio-economic rights including the responsibilities of transnational corporations and agencies as well as the relationship between different branches of international law in domestic law. There are creative opportunities for expanding the jurisprudence of the Court. There are a number of substantive and procedural areas where the frontiers of law can be pushed to make it more legitimate. The Court's legitimacy will depend to a large extent on its ability to offer support to social movement struggles which are primarily focused on the realization of economic and social rights at a time of economic liberalization and globalization.